

April 8, 2016

***SUBMITTED BY ECFS***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: ***Ex Parte Communication***, GN Docket No. 12-268, *In the Matter of Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*

Dear Ms. Dortch:

This letter is submitted with respect to the expected incentive payment forms, as described in the *Wireless Telecommunications Bureau Clarifies Procedure for Disbursing Reverse Auction Incentive Payment*, 30 FCC Rcd 13613 (WTB 2015) ("Payment Public Notice"), which will allow winning reverse auction bidders to instruct the Commission that incentive payments due to them be disbursed to a permitted group of third parties, including a "qualified intermediary" and "qualified trustee." The Payment Public Notice requires that the permitted group of third party recipients: (1) agree to indemnify and to hold harmless the United States from any and all liability arising from the disbursement of incentive payments, (2) acknowledge and agree that the payments are subject to offset pursuant to applicable law for debts (owed to the Commission or the United States) by either the winning bidder or the third party payee designated by the winning bidder, and (3) acknowledge and agree that payments will not be made to (or for the benefit of) any winning bidder or other payee appearing on the U.S. Treasury's 'Do not Pay' portal.

One of the listed permissible third party recipients is identified as a "qualified trustee," which we expect will be well-established financial institutions acting solely as depositories and whose duty will be limited to transferring funds they have received at the instruction of the qualified intermediary. With respect to the agreements and acknowledgements to be made by third party recipients, we ask that the Commission advise, pursuant to Section 1.2 of its rules, as to whether a "qualified trustee" needs to provide the FCC with documentation agreeing to and acknowledging the three points described in the Payment Public Notice? We believe that this question is of importance to reverse auction bidders who plan to make use of the procedures described in the Payment Public Notice and we will discuss herein why a timely response is in the best interest of the reverse auction bidders and the Commission.

It is our understanding that parties considering reverse auction arrangements, under the terms set out in the Payment Public Notice, are contemplating the use of a qualified intermediary and a qualified trustee. The qualified intermediary plays the critical role between the auction

bidder/sharee and the sharer in a channel sharing agreement and will serve as the recipient to whom the winning bidder instructs the FCC to deliver its incentive auction payment. The qualified trustee serves as the depository of the funds (merely a bank account) used to segregate the funds from the qualified intermediary itself, subject to certain terms that are required in order to comply with Section 1031 of the Internal Revenue Code and, where necessary, State laws. The instructions provided by the winning bidder to the FCC may be expected to read: "Send to Qualified Trustee X, c/o Qualified Intermediary Y." The account established at a financial institution serving as a qualified trustee would be in the name of the qualified intermediary, with a reference to it serving the winning bidder, thereby ensuring that the funds are in a reputable banking institution and isolated from the qualified intermediary.

We appreciate that the qualified intermediary will need to agree to and acknowledge the three provisions contained in the Payment Public Notice, but submit that it is appropriate for a determination be made that the qualified trustee (provided it is a federally or state chartered financial institution acting merely as depository of the funds) does not have to provide the FCC with any indemnity or hold harmless agreement, or other acknowledgement. For various reasons, financial institutions, whose only function will be to serve as a depository of funds, can be expected not to be willing to provide general indemnities, even with a complete hold harmless provision extended by the winner bidding.

We expect that reverse auction bidders are now undertaking the process of documenting the operating provisions with their selected qualified intermediaries and qualified trustees so that all future steps relating to the deposit of FCC incentive payments and the Section 1031 exchange flow smoothly. While FCC incentive payment forms have not been made public, terms by which qualified trustees must comply are being considered in the qualified exchange trust agreement. If the FCC requires qualified trustees to execute certain documentation that imposes unacceptable obligations upon them, then auction bidders might well find those financial institutions unwilling to be accommodating and to serve the vital function of holding significant sums of money in reputable financial institutions. It would be beneficial for reverse auction bidders to have all documentation in order at an early stage and not have auction bidders scrabbling to find accommodating qualified trustees after incentive payment forms and related instructions are released and parties are under time pressure to act.

We would expect that all auction bidders who are structuring their arrangements to qualify for Section 1031 treatment will have the same question. Some might be addressing the question currently and others might address the question in the future. Commission guidance on this topic will be very helpful to the reverse auction bidders and the financial institutions that they can be expected to work with.

Should there be any questions in regard hereto, please communicate with the undersigned.

Respectfully submitted,



Barry A. Friedman

cc: Mr. Gary Epstein, FCC IATF  
Mr. Howard Symons, FCC IATF  
Mr. Frank Ferrante, Thompson Hine LLP